



April 16, 2015

**VIA FOIA ONLINE**

Regional Freedom of Information Officer  
U.S. EPA, Region 9  
75 Hawthorne Street (OPA-2)  
San Francisco, CA 94105

*Re: FOIA Request Seeking Records Relating to Class II Injection Well Program Primacy  
Delegation by EPA to California Division of Oil, Gas and Geothermal Resources*

To Whom It May Concern:

Pursuant to 5 U.S.C. § 552, I write to request, on behalf of the Center for Biological Diversity ("Center"), the production of records relating to the delegation of primacy in the regulation of Class II injection wells under Section 1425 of the Safe Drinking Water Act ("Class II program") by U.S. Environmental Protection Agency ("EPA") to the State of California Department of Conservation Division of Oil and Gas (now the Division of Oil, Gas and Geothermal Resources ("DOGGR")).

Specifically, the following documents and records generated, modified or acquired by EPA between April 1, 1980 and July 31, 1983 are requested:

- (1) All documents and records, including correspondence, discussing, referring or relating to an Application by DOGGR (formerly the Division of Oil and Gas) for Primacy in the Regulation of Class II Injection Wells under Section 1425 of the Safe Drinking Water Act ("Class II program"), not including the final April 20, 1981 Application itself, which is already public<sup>1</sup>;
- (2) All documents and records, including correspondence, discussing, referring or relating to the responsibilities of and procedures to be used by DOGGR and EPA in administration of wells in the Class II program;
- (3) All documents and records, including correspondence, discussing, referring or relating to any Memorandum of Agreement between EPA and DOGGR establishing the

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<sup>1</sup> The April 20, 1981 Application is available at  
[http://www.conservation.ca.gov/dog/general\\_information/Documents/Application%20for%20Primacy.pdf](http://www.conservation.ca.gov/dog/general_information/Documents/Application%20for%20Primacy.pdf).

responsibilities of and procedures to be used by DOGGR and EPA in administration of wells in the Class II program;

- (4) All documents and records, including correspondence, discussing, referring or relating to EPA's formal delegation of Class II program primacy to DOGGR.

The term "documents and records" means all forms of written or recorded matter, including correspondence, memoranda, studies, records, e-mail, data sheets, reports, evaluations, summaries, opinions, journals, calendars, statistical records, notes, recordings of telephone calls, and other communications, including but not limited to, notes, memoranda and other writings of or relating to telephone conversations and conferences, minutes and notes of transcription of all meetings and other communications of any type, and any other information that is stored electronically, and that can be retrieved in printed, graphic, or audio form, including, but not limited to, information stored in the memory of a computer device, data stored on removable magnetic or optical media, e-mail, data used for electronic interchanges, digitized pictures and audio, and voice mail.

"Correspondence" includes any correspondence between any state or federal agencies, as well as correspondence between outside consultants, scientists, politicians, industry groups, and other entities.

It is requested that, where possible, documents be provided electronically (on a CD, for example) to avoid copy expense and to further expedite receipt of the materials. If the agency makes records available electronically, please provide the records in their native format.

Please send copies of these documents to:

Tamara Zakim  
Earthjustice California Office  
50 California St., Suite 500  
San Francisco, CA 94111  
[tzakim@earthjustice.org](mailto:tzakim@earthjustice.org)

If for any reason you deny this request, please specify the statutory exemption(s) upon which you rely to withhold information. If you determine that some portions of the requested documents are exempt, please provide the remaining nonexempt portions.

### **Fee Waiver Request**

FOIA directs agencies to furnish records without any charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public

understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii)(1994 & Supp. IV 1998). The Center should be granted a fee waiver in connection with this FOIA request because the Center meets all requirements set out in FOIA.

First, the subject matter of the requested records specifically concerns identifiable operations or activities of the government, i.e., EPA's discussion, consideration, negotiation, terms and approval of Class II program primacy delegation to DOGGR pursuant to the SDWA. EPA's primacy delegation is a specific and identifiable activity of an executive branch agency of the government. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) ("'[R]easonable specificity' is 'all that FOIA requires' with regard to this factor.") (internal quotations omitted). Decisions made or analyses or correspondence conducted by EPA in the course of evaluating DOGGR's application for primacy, negotiating the terms of delegation and granting primacy is a U.S. government operation. This FOIA request thus concerns the operations or activities of the government.

Second, the disclosure of the requested information is likely to directly contribute to the public understanding of specific government operations or activities. Documents responsive to the request herein will improve understanding of EPA's process when it considered and granted DOGGR's application for primacy, including but not limited to the negotiation and discussion between the federal and state agencies regarding the terms and procedures for the Class II program primacy delegation. In turn, this information may provide insight into EPA's management and oversight of underground sources of drinking water via primacy delegation to the state agency. Production of the requested documents is accordingly "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552 (a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2).

Third, disclosure of the requested information will contribute to the public understanding at large. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 825,000 members and online activists dedicated to protecting endangered species and wild places. Combining conservation biology with litigation, policy advocacy, media outreach and strategic vision, the Center is working to secure a future for animals and plants hovering on the

brink of extinction and the wilderness they need to survive. The Center's Climate Law Institute's primary mission is to curb global warming and other air pollution, and to sharply limit its damaging effects on endangered species and their habitats, and on all of us who depend on clean air, a safe climate, and a healthy web of life.

To meet its goals, the Center informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has repeatedly displayed its ability to disseminate information granted to it through FOIA and, in consistently granting the Center's fee-waivers, agencies have recognized that the Center possesses the experience and expertise necessary to evaluate the requested information and provide it to the public in a useful form.

The Center provides information received from FOIA requests to the public in a variety of formats, including but not limited to online dissemination of information via email newsletters, action alerts and social media to more than 825,000 members and online activists; printed newsletters distributed to the Center's members as well as the memberships of many other conservation organizations; formal reports written by staff scientists or attorneys that are shared widely with policymakers, advocates, media, members and others; and distribution of information to public media outlets. Courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. *See Forest Guardians v. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

The information requested herein will contribute to the public understanding of the primacy delegation process, including the discussions and considerations that occurred when EPA agreed to discharge its groundwater protection duties under the SDWA and delegate primacy to DOGGR in 1982. The requested documents are not currently in the public domain and their release is not only "likely to contribute," but is certain to contribute significantly to better public understanding of the operations of or activities of the government concerning the regulation of Class II underground injection wells and underground sources of drinking water. 5 U.S.C. §552(a)(4)(A)(iii); 40 C.F.R. § 2.107(k)(2). The Center intends to use the new information it receives to inform the public; in particular, release of the information will empower members of Center, and members of the public, to engage in public advocacy efforts to protect and conserve California's underground sources of drinking water, and to more effectively evaluate the need for litigation or grassroots action.

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Fourth, information requested herein will contribute significantly to the public understanding of government operations or activities. Without the requested information, the public has very little knowledge of the specific considerations that occurred when EPA delegated primacy to DOGGR and the process by which terms and procedures were established for DOGGR's Class II program primacy. Enhanced understanding of the Class II program primacy delegation and related negotiations at the time of delegation are critical to understanding the current, ongoing management of the Class II program by DOGGR. The requested information will shed light on the circumstances surrounding and basis for the primacy delegation, the possible effects of that delegation, and the information the agency had in its possession at the time of its decision. The public's understanding of these matters, as compared to the level of public understanding existing prior to the disclosure, will be significantly enhanced by the dissemination of this information. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value.

Finally, the disclosure of this information would not serve any commercial interest. The Center is a non-profit organization and has no commercial interest in the information. Finally, for the same reasons, there need not be any weighing of the requester's commercial interest against the public interest; the Center's sole interest in the information is to serve the public interest.

The Center's track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities is well established. It thus follows that Center should be granted a fee waiver in connection with this FOIA request.

Should you have any questions regarding, or suggestions for facilitating this request, please contact me at 415-217-2000 or e-mail me at [tzakim@earthjustice.org](mailto:tzakim@earthjustice.org). I look forward to your response within twenty days, as required by 5 U.S.C. § 552(a)(6)(A).

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Zakim', with a stylized flourish at the end.

Tamara Zakim  
Earthjustice